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10 Attorneys for Plaintiff

11 **UNITED STATES DISTRICT COURT**
12 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

13 **PACIFIC BAY MASONRY, INC., a**
14 **California corporation,**

15 **Plaintiff,**

16 **v.**

17 **NAVIGATORS SPECIALTY**
18 **INSURANCE COMPANY, a New**
19 **York corporation; and DOES 1 through**
20 **10, inclusive,**

21 **Defendants.**

Case No.

COMPLAINT FOR

1. DECLARATORY RELIEF;
2. BREACH OF CONTRACT;
3. TORTIOUS BREACH OF
CONTRACT; AND
4. VIOLATION OF BUSINESS AND
PROFESSIONS CODE § 17200

DEMAND FOR JURY TRIAL

22 Plaintiff alleges as follows:

PARTIES

23 1. Plaintiff PACIFIC BAY MASONRY, INC. (“Pacific Bay”) is a
24 California corporation with its principal place of business in San Jose, California.

25 2. Defendant NAVIGATORS SPECIALTY INSURANCE COMPANY
26 (“Navigators”) is a business entity of unknown form alleged on information and belief
27 to be domiciled in the State of New York. Navigators is alleged on information and
28

1 belief to be engaged in the business of issuing insurance coverage throughout the
2 United States.

3 3. Defendants DOES 1 through 10, inclusive, are sued herein under
4 fictitious names. Their true names and capacities are unknown to Pacific Bay. When
5 their true names and capacities are ascertained, Pacific Bay will amend this complaint
6 by inserting such true names and capacities herein. Pacific Bay is informed and
7 believes and thereon allege that each of the fictitiously-named Defendants is the agent
8 and/or employee of each other Defendant.

9 **JURISDICTION AND VENUE**

10 5. This Court has diversity jurisdiction over this proceeding pursuant to 28
11 U.S.C. § 1332 because: (1) Pacific Bay is a California corporation doing business in
12 California, and Navigators is alleged on information and belief to be a corporation
13 which is neither incorporated in the State of California nor has its principal place of
14 business in the State of California; and (2) the amount in controversy exceeds seventy
15 five thousand dollars (\$75,000.000) exclusive of interests and costs.

16 6. Venue is alleged in this San Jose Division of the Northern District
17 pursuant to 28 U.S.C. § 1391(b) based on the fact that a substantial part of the events
18 or omissions giving rise to the claim occurred in San Jose.

19 **GENERAL ALLEGATIONS**

20 4. Navigators issued a series of insurance policies covering Pacific Bay for
21 general liability risks from July 11, 2008, through June 15, 2016 (collectively, “the
22 Navigators Policy”).

23 5. A copy of one of that series of insurance policies, covering the period of
24 June 15, 2015 through June 15, 2016 is appended hereto and incorporated herein by
25 this reference as **Exhibit 1**. Pacific Bay is informed and believes that Exhibit 1
26 constitutes a true and accurate copy of the Navigators Policy covering Pacific Bay as
27 an insured for the referenced time period.

1 6. The insurance coverage agreement (“Coverage Agreement”) between
2 Navigators and Pacific Bay was reflected in the following paragraph of the Navigators
3 Policy:

4 We will pay those sums that the insured becomes legally begin to pay as
5 damages because of... “Property damage” which this insurance applies.

6 We will have the right and duty to defend the insured against any “suit”
7 seeking those damages.

8 7. The term “occurrence” employed in the above-quoted coverage
9 agreement was defined in the Navigators Policy as follows:

10 “Occurrence” means an accident, including continuous or repeated
11 exposure to substantially the same general harmful conditions/

12 8. The term “property damage” employed in the above quoted provision of
13 the Navigators Policy was defined as:

14 “Property damage” means... [p]hysical injury to tangible property
15 including all resulting loss of use of that property. All such loss of use
16 shall be deemed to occur at the time of the physical injury that caused it;
17 or...[l]oss of use of tangible property that is not physically injured. All
18 such loss of use shall be deemed to occur at the time of the “occurrence”
19 that caused it.

20 9. In addition to the coverage expressly provided in the Coverage
21 Agreement the Navigators Policy, the Navigators Policy also provides Pacific Bay
22 coverage for “insured contracts” as defined by the policy. As defined by the
23 Navigators Policy an “insured contract” includes:

24 That part of any other contract or agreement pertaining to your
25 business... under which you assume the tort liability of another party to
26 pay for “bodily injury” or “property damage” to a third person or
27 organization. Tort liability means a liability that would be imposed by
28 law in the absence of any contract or agreement.

1 10. A liability claim was made against Pacific Bay on behalf of the third-
2 party claimant Deacon Corp., a California corporation (“Deacon”)¹ in or about
3 December, 2017 when Deacon initiated litigation in the form of a cross-complaint
4 seeking to obtain a money judgment against Pacific Bay because of “property
5 damage” to which the Navigators Policy applies (the “Litigation”).

6 11. In addition to seeking money damages against Pacific Bay because of
7 alleged “property damage” allegedly caused by Pacific Bay, Deacon also sought
8 damages from Pacific Bay arising from an “insured contract” as defined by the
9 Navigators Policy.

10 12. Pacific Bay timely tendered its defense (“Tender of Defense”) of
11 Deacon’s claims in the Litigation to Navigators.

12 13. Deacon also tendered its defense and indemnity to Navigators in its
13 capacity as Pacific Bay’s general liability insurer under both the “property damage”
14 and “insured contract” coverages of the Navigators Policy.

15 14. By letter dated August 15, 2018 (the “Denial Letter”) Navigators denied
16 any and all coverage obligations to Pacific Bay under the Navigators Policy. A true
17 and accurate copy of that denial of coverage letter of August 15, 2018, is appended
18 hereto as **Exhibit 2** and is incorporated herein by this reference.

19 15. In the Denial Letter Navigators asserted, *inter alia*, that it had completed
20 “an investigation of this matter.”

21 16. In the Denial Letter Navigators predicated its denial upon the assertion
22 that “the allegations of ‘property damage’ is to ‘your work’ and ‘your product’.”
23 Navigators further asserted that “the repair, replacement or removal of ‘your work’
24 and ‘your product’ is not covered under the policy.”
25
26

27
28 ¹ Pacific Bay alleges on information and belief that on or around October 1,
2019 Deacon Corp. converted to Deacon Builders, LLC.

1 17. The foregoing statements in Navigators' Denial Letter are in part false,
2 misleading, and, or, materially incomplete to the extent that they are either negligently
3 or intentionally contrived to give the false appearance of a justifiable denial of both
4 Navigators' duty to defend and its potential duty to indemnify.

5 18. Contrary to the foregoing representations of Navigators, it is evident
6 from the allegations of Deacon, alone and in conjunction with the facts available to
7 Navigators in a reasonably prompt and thorough investigation, that there is potential
8 indemnity coverage arising from the allegations of Deacon, and hence Navigators has
9 a duty to defend Pacific Bay as a matter of law.

10 19. Navigators' duty to defend is first evident by the fact that, as
11 acknowledged expressly in writing by Navigators, the facts alleged in Deacons'
12 Litigation trigger the possibility that Deacon, if successful in the Litigation, would
13 prove potentially covered "property damage" constituting an "occurrence" within the
14 policy period. In this regard Navigators concedes this material fact on the fifth page
15 of the Denial Letter wherein it acknowledges:

16 The allegations of the plaintiffs include "property damage" resulting
17 from construction defects including work completed by you and/or your
18 company which would constitute an "occurrence" within the policy
19 period.

20 20. Having expressly recognized the potential of "property damage" arising
21 from an "occurrence" arising from Deacon's allegations in the Litigation, Navigators
22 purports to "justify" its denial of the duty to defend by citing, and materially
23 misrepresenting the import of, two exclusions in the Navigators Policy. As quoted by
24 Navigators in its Denial Letter those exclusions state as follows:

25 k. Damage To Your Product

26 "Property damage" to "your product" arising out of it or any part of it.

27 l. Damage To Your Work
28

1 “Property damage” to “your work” arising out of it or any part of it and
2 included in the “products-completed operations hazard”.

3 21. As also quoted in the Denial Letter, the term “your product” is defined
4 in the Navigators Policy as meaning any “(1) Any goods or products, other than real
5 property, manufactured, sold, handled, distributed or disposed of by (a) You; (b)
6 Others trading under your name; or (c) A person or organization whose business or
7 assets you have acquired; and (2) Containers (other than vehicles), materials, parts or
8 equipment furnished in connection with such goods or products. The “your product”
9 exclusion contains additional language relating to “warranties or representations” as
10 set forth in Exhibit 2.

11 22. As also quoted in Navigators Denial of the term “your work” is defined
12 in the Navigators Policy as meaning “(1) Work or operations performed by you or on
13 your behalf; and (2) Materials, parts or equipment furnished in connection with such
14 work or operations.” This exclusion also includes language relating to “warranties or
15 representations” as set forth in Exhibit 2.

16 23. In denying both the duties to defend and indemnify, Navigators
17 misrepresents the scope of the “your product” and “your work” exclusions. In so
18 doing, Navigators falsely claims that the certain prospective application of those
19 exclusions is triggered if there is simply an allegation of “property damage” to the
20 insured’s “product” and/or to the insureds “work.” In fact, neither exclusion is
21 triggered by the simple fact that an allegation claims damage to the insured’s
22 “product” or its “work.” Each exclusion requires as an additional condition precedent
23 that the alleged damage to the “product” or the “work” “arises out of” either the
24 “work” in the case of the “your work” exclusion, or the “product” in the case of the
25 “your product” exclusion.

26 24. Thus if, as is the case here, it is possible that “property damage” to the
27 insured’s “work” or to the insured’s “product” arises out of a causal source other than
28 the “work” or “product,” as the case may be, then the exclusion is not triggered.

1 25. By representing that the exclusions are triggered solely by an allegation
2 that there is damage either to the insured's "work" or the insured's "product," without
3 simultaneously acknowledging that such damage is only excluded if the "property
4 damage" "arises out of" either the "work" or the "product," Navigators has materially
5 misrepresented the scope of the "your work" and "your product" exclusions to the
6 manifest detriment of Pacific Bay.

7 26. The foregoing misrepresentation also conceals from the insured that the
8 mere fact that a third-party claimant such as Deacon might allege "property damage"
9 to the insured's "product" or the insureds "work" does not mean that the "your
10 product" and/or "your work" exclusions negate potential coverage for the separate
11 and distinct "property damage" of "loss of use" of tangible property sustained by the
12 third-party claimant or the underlying property owner. Even if the "your work" and/or
13 "your product" exclusions are applicable to negate coverage for "physical injury to
14 tangible property" constituting the "work" or "product" of the insured, if there is at
15 least the "bare potential or possibility" of a "loss of use" of tangible property being
16 incurred by the claimant that "loss of use" is not within the scope of the "your product"
17 or "your work" exclusion and therefore does not negate Navigators' duties to defend.

18 27. Another manner in which Navigators has misrepresented the scope of the
19 "your work" and "your product" exclusions is by ignoring the fact that the exclusions
20 are completely inapplicable if damage to the insured's "work" or the insured's
21 "product" causes *consequential damage* to property other than just the insured's
22 "work" or its "product." Where, as here, there is at least the "bare potential or
23 possibility" that the insured's "work" or "product" may cause "property damage" to
24 property other than the insured's "work" or "product," then the "your work" and "your
25 product" exclusions do not negate either the duty to defend or the duty to indemnify.

26 28. Another manner in which Navigators has misrepresented the scope of the
27 "your work" and "your product" exclusions is by falsely suggesting that there is no
28 potential coverage, and hence no duty to defend, if the damage to the insured's "work"

1 arises from the insured's "product," or if the damage to the insured's "product" arises
2 out of the insureds "work." If damage to the insured's "work" could possibly arise out
3 of the insured's "product," or if damage to the insured's "product" could possibly
4 arise out of the insureds "work," then neither the "your work" nor "your product"
5 exclusions apply.

6 29. Navigators' Denial Letter further misrepresents the scope of coverage of
7 the Navigators Policy by intentionally, or at minimum grossly negligently, failing to
8 mention the potential coverage triggered for Pacific Bay under the "insured contract"
9 coverage.

10 30. As quoted above, the "insured contract" coverage is expressly intended
11 to apply where, as here, an insured such as Pacific Bay has contractually agreed to
12 defend and/or indemnify a third-party claimant such as Deacon for "tort liability of
13 [that] party to pay for..." "property damage" to a third person or organization."
14 Deacon's Litigation against Pacific Bay plainly presents the possibility that the
15 "insured contract" coverage will be triggered and hence compels the conclusion as a
16 matter of law that Navigators has a duty to defend, and the potential duty to indemnify,
17 Pacific Bay arising from those allegations of Deacon.

18 31. The obviousness of the potential for coverage under the "insured
19 contract" provision of the Navigators Policy underscores the egregiousness of
20 Navigators' failure to even mention the "insured contract" coverage or the definition
21 of "insured contract" in the Denial Letter. This egregiousness is underscored given
22 that the Denial Letter expressly references the third-party demands for indemnity from
23 Deacon which clearly and obviously triggered the potential for "insured contract"
24 coverage.

25 32. The only possible reasons for a claims adjuster, such as the author of the
26 Denial Letter, not to have mentioned the obviously applicable potential for coverage
27 arising out of the "insured contract" coverage would be either a conscious desire to
28 materially mislead the insured into believing it is not entitled to a defense, or a grossly

1 negligent ignorance on the part of the claims adjuster of the meaning and import of
2 the policy's "insured contract" coverage.

3 33. Pacific Bay alleges on information and belief that whatever the reason
4 for the failure of the Denial Letter to mention the "insured contract" coverage, it is a
5 reflection of the fact that Navigators has a deliberately effectuated policy of not
6 training its claims handling personnel at all with respect to the duty to defend-
7 triggering implications of the "insured contract" coverage.

8 34. Pacific Bay further alleges on information and belief that the same is true
9 concerning Navigators' policy with respect to training its claims adjusters on the
10 meaning and scope of the "your product" and "your work" exclusions. Pacific Bay is
11 informed and believes that Navigators deliberately fails to train its claims handling
12 personnel on the actual limited scope of those exclusions, consciously allowing or
13 inducing its claims personnel to believe that those exclusions are triggered by a mere
14 allegation of damage to the insured's "product" or the insured's "work," regardless of
15 whether or not that alleged damage "arises out of" that "product" or "work."

16 35. As a direct consequence of Navigators' wrongful denial of the duty to
17 defend, Pacific Bay was compelled to engage counsel and defend itself against
18 Deacon's Litigation.

19 **FIRST CLAIM FOR RELIEF**

20 **(Declaratory Relief)**

21 **(Against All Defendants)**

22 36. Pacific Bay hereby incorporates by reference each and every allegation
23 set forth above as if fully set forth herein.

24 37. There is an ongoing active and material dispute between the parties with
25 respect to their respective rights and duties under the Navigators Policy.

26 38. The parties are unable to resolve this dispute without intervention of this
27 Court and therefore seek a declaration adjudicating their respective rights and duties.
28

1 39. Pacific Bay contends, and Navigators disputes, that upon receipt of the
2 Tender of Defense from Pacific Bay, Navigators then had an immediate duty to
3 promptly and thoroughly investigate the Deacon Litigation and to immediately defend
4 Pacific Bay against the claims of the Deacon.

5 40. Pacific Bay further contends, and Navigators disputes, that Navigators
6 failed to promptly and thoroughly investigate the Deacon Litigation against Pacific
7 Bay.

8 41. Pacific Bay further contends, and Navigators disputes, that had
9 Navigators promptly, thoroughly and competently investigated the Deacon Litigation
10 Navigators would have discovered that Deacon alleged facts constituting a potentially
11 covered “occurrence,” or potentially covered “occurrences” (as the term “occurrence”
12 is defined in the Navigators Policy), giving rise to “property damage” as defined in
13 the Navigators Policy.

14 42. In this regard Deacon’s alleged property damage included both aspects
15 of “property damage” as defined in the Navigators Policy: to wit, both physical injury
16 to, and loss of use of, tangible property.

17 43. Pacific Bay contends, and Navigators disputes, that Pacific Bay is
18 entitled to a declaratory judgment from this Court stating, *inter alia*:

19 a. Had Navigators promptly and thoroughly investigated Pacific
20 Bay’s Tender of Defense of Deacon’s Litigation, Navigators could and should
21 have discovered that it was at least possible that Deacon, if successful in
22 proving the allegations made in the Litigation, could have proved money
23 damages against Pacific Bay for “property damage” to which the Navigators
24 Policy applied;

25 b. Upon receipt of the Tender of Defense Navigators owed Pacific
26 Bay an immediate duty to defend Pacific Bay against the claims of the Deacon;
27 and

28 c. Navigators breached its duty to defend Pacific Bay.

SECOND CLAIM FOR RELIEF

(Breach of Contract)

(Against All Defendants)

44. Pacific Bay hereby incorporates by reference each and every allegation set forth above as if fully set forth herein.

45. Navigators breached its contract or contracts with Pacific Bay by, *inter alia*: (1) failing to promptly and thoroughly investigate the Tender of Defense, (2) failing to honor the duty to defend which arose immediately upon the receipt of the Tender of Defense by Navigators, and (3) materially misrepresenting the terms of the Navigators Policy in the Denial Letter.

46. Navigators is liable to Pacific Bay for all damages proximately caused by Navigators. These damages include but are not necessarily limited to: (1) the costs of defense and attorney fees incurred by Pacific Bay to defend itself against the claims of Deacon; (2) any settlement amount actually paid by Pacific Bay in partial or full settlement of Deacon's claims; and (3) any amounts necessary to fully satisfy any judgment against Pacific Bay and in favor of Deacon.

THIRD CLAIM FOR RELIEF

(Tortious Breach of Contract)

(Against All Defendants)

47. Pacific Bay hereby incorporates by reference each and every allegation set forth above as if fully set forth herein.

48. In breaching the contract or contracts with Pacific Bay, Navigators acted unreasonably and in bad faith by (1) negligently and/or intentionally attempting to and actually misleading Pacific Bay into believing that the contentions of non-coverage made in the Denial Letter were true and accurate reflections of the meaning and effect of the terms of the Navigators Policy quoted in the Denial Letter; and (2) denying Pacific Bay the benefits which it was entitled under the Navigators Policy.

1 49. Contrary to the representations in the Denial Letter, Navigators either
2 actually knew or should have known at the time the Denial Letter was written that the
3 Denial Letter contained material misrepresentations of the meaning and effect of the
4 Navigators Policy.

5 50. Had Navigators made a good faith and truthful representation of the
6 meaning and effect of the relevant terms of the Navigators Policy at the time it issued
7 the Denial Letter, it would have acknowledged the immediate duty to defend Pacific
8 Bay against the claims of the Deacon in the Litigation.

9 51. Pacific Bay is informed and believes that the evidence elicited through
10 the process of discovery will establish that Navigators either actually knew that it
11 owed the duty to defend at the time it issued the Denial Letter, or that it was grossly
12 negligent in issuing the Denial Letter, and did so for the contrived purpose of
13 financially benefiting itself to the substantial detriment of Pacific Bay, all the while
14 knowing that its course of action was wrongful and certain to substantially harm
15 Pacific Bay.

16 52. Based on the foregoing, Pacific Bay alleges that the issuance of the
17 Denial Letter was a reflection of fraud, oppression and/or malice on the part of
18 Navigators and that it should therefore be assessed with exemplary damages so as to
19 both punish that misconduct and deter its recurrence in the future.

20 **FOURTH CLAIM FOR RELIEF**

21 **(Violation of Business & Professions Code § 17200)**

22 **(Against All Defendants)**

23 53. Pacific Bay hereby incorporates by reference each and every allegation
24 set forth above as if fully set forth herein.

25 54. The conduct of Navigators alleged herein constitutes illegal unfair and
26 improper business practices constituting unfair competition in violation of California
27 Business & Professions Code Section 17200 et seq. (“§ 17200”).
28

2. On the second count for breach of contract, as follows:
 - a. For money damages in accordance with proof at trial;
 - b. For costs of suit incurred herein; and
 - c. For such other relief as the court may deem just and equitable.
3. On the third count for tortious breach of contract, as follows:
 - a. For money damages in accordance with proof at trial;
 - b. For costs of suit incurred herein;
 - c. For an award of attorney fees pursuant to *Brandt v. Superior Court* 85) 37 Cal.3d 813;
 - d. For punitive damages in an amount determined by the finder of fact to serve the dual goals of punishment and deterrence.
4. On the fourth count for unfair business practices, as follows:
 - a. For injunctive relief enjoining the performance of any proven unfair business practices in the future and mandating that Navigators properly train its claims handling personnel to recognize duty to defend implications as alleged hereinabove;
 - b. For any interlocutory and final orders necessary to effect full relief for the benefit of Pacific Bay and the general public;
 - c. For such other relief as the court deems just and equitable.

DATED: October 20, 2020

BORCHARD & CALLAHAN, APC

By: /s/ Michael G. Dawe

MICHAEL G. DAWE

BRIAN D. CRONIN

Attorneys for Vivian Schwartz and
Lawrence Schwartz

DEMAND FOR JURY TRIAL

In accordance with Federal Rules of Civil Procedure 38 and 39, Plaintiff Pacific Bay Masonry hereby asserts its rights under the Seventh Amendment of the United States Constitution and demands a trial by jury on all issues embodied in Plaintiffs' Complaint.

DATED: October 20, 2020

BORCHARD & CALLAHAN, APC

By: /s/ Michael G. Dawe

MICHAEL G. DAWE

BRIAN D. CRONIN

Attorneys for Plaintiff